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IN THE
COURT OF APPEALS OF INDIANA

HENRY LEWIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0610-CR-921
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jane Magnus Stinson
The Honorable Jeffrey Marchal, Commissioner
Cause No. 49G06-0503-FB-50918

April 24, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Henry Lewis (Lewis), appeals his convictions for Count I, burglary, a Class B felony, Ind. Code § 35-43-2-1; Count II, burglary, a Class C felony, I.C. § 35-43-2-1; Count III, robbery, a Class B felony, I.C. § 35-42-5-1; and Count IV, criminal recklessness, a Class D felony, 35-42-2-2.

We reverse and remand for new trial.

ISSUE

Lewis raises one issue on appeal, which we restate as follows: Whether the trial court abused its discretion by allowing the State to re-open its case during closing arguments to present more evidence.

FACTS AND PROCEDURAL HISTORY

Marvin Engelking (Engelking) lived in a building on East 10th Street in Indianapolis. Victor Dimichieli (Dimichieli), Engelking's employer, owns the building and also uses the building as the central location for his business.

On March 2, 2005, Engelking returned to the building after approximately a two-hour absence to find the gate to the storage area behind the building ajar. Engelking entered the storage area and noticed the lock on a shed had been broken, the shed was open and a tiller was missing. It was then Engelking heard the steel door to the building "slam" and saw a man later identified as Lewis crawling out of the yard. Once Lewis stood up in the alley Engelking noticed Lewis had a bucket of tools and a chainsaw.

Engelking ran after Lewis down the alley. When Engelking caught up to Lewis, he tapped Lewis on the shoulder and informed him those were his belongings. Lewis

fiddled in his pocket as though he possessed a weapon. He then picked up the chainsaw and swung it at Engelking. Lewis also punched Engelking in the face. Lewis then picked up the power saw from the bucket and took off running down the alley with both the power saw and chainsaw. Engelking chased after him.

While chasing Lewis, Engelking passed a utility van and asked the driver to call the police. Engelking also saw Lewis put both saws in a dumpster. Engelking called Dimichieli on a two-way radio and told him where the tools had been dropped.

Officer Mark Rand (Officer Rand) joined in the chase at some point. Officer Rand was a canine officer. He observed a man walking down the street change directions when another police vehicle turned onto the street. When Lewis turned around he was headed in Officer Rand's direction. Officer Rand got out of his police car and ordered Lewis to stop. Lewis ran from Officer Rand who returned to his car to retrieve his canine. Officer Rand and his canine tracked Lewis to a vacant house and out to the street, but then the dog lost the scent.

Dimichieli recovered and identified his tools. When Engelking returned to his apartment on East 10th St., his bedroom was in disarray and there was a footprint on his bed. No fingerprints were sought because Lewis was wearing gloves. Engelking and Officer Rand later identified Lewis in a six person photo array, and at trial.

On March 30, 2005, the State filed an Information charging Lewis with Count I, burglary, a Class B felony, I.C. § 35-43-2-1; Count II, burglary, a Class C felony, I.C. § 35-43-2-1; Count III, robbery, a Class B felony, I.C. § 35-42-5-1; Count IV, criminal recklessness, a Class D felony, I.C. § 35-42-2-2; and Count V, theft, a Class D felony,

I.C. § 35-43-4-2. On June 13, 2005, the State filed an additional Information charging Lewis with being a habitual offender, I.C. § 35-50-2-8. A jury trial commenced on August 2, 2006, but on August 3, 2006 a mistrial was declared as the jury could not reach a verdict. On August 30 and 31, 2006, a second jury trial was held. During closing arguments Lewis' counsel suggested that the police were not thorough in their investigation at which point the State moved to reopen its case contending Lewis' counsel had just opened the door to otherwise inadmissible evidence. The trial court allowed the State to reopen its case. Defense counsel objected. The State presented evidence that Lewis had been arrested during the commission of a burglary ten days after the commission of the instant offenses one block from the scene of the instant offenses. The jury found Lewis guilty of Counts I-IV. Lewis waived jury for the finding of habitual offender and was found to be a habitual offender by the trial court.

On September 21, 2006, the trail court sentenced Lewis to twenty years on Count I, burglary, a Class B felony, enhanced by 25 years for the habitual offender adjudication, eight years on Count II, burglary, a Class C felony, twenty years on Count III, robbery, a Class B felony, and three years on Count IV, criminal recklessness, a Class D felony with sentences to run concurrently for a total executed sentence of forty-five years.

Lewis now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Lewis claims the trial court abused its discretion when it allowed the State to reopen its case and present new evidence during closing arguments. Specifically, Lewis argues his trial counsel did not open the door for the State to present evidence that he had

committed a similar crime ten days after the commission of the instant offense while wearing brown jersey gloves in the same neighborhood. We agree.

The granting of permission to reopen a case is within the discretion of the trial court and the decision will be reviewed only to determine whether or not there has been an abuse of that discretion. *Ford v. State*, 523 N.E.2d 742, 745 (Ind. 1988). Among the factors which weigh in the exercise of discretion are whether there is any prejudice to the opposing party, whether the party seeking to reopen its case appears to have rested inadvertently or purposely, the stage of the proceedings at which the request is made, and whether any real confusion or inconvenience would result from granting the request. *Id.* at 745-46. Two conditions must be shown to exist to justify a court of appellate jurisdiction in setting aside a ruling made by a trial court in the exercise of judicial discretion: 1) the action complained of must have been unreasonable in light of all attendant circumstances or it must have been clearly untenable or unreasonable; and 2) the action was prejudicial to the rights of the complaining party. *Id.*

Here, the State moved to reopen its case in order to admit otherwise inadmissible character evidence as a result of statements made by Lewis' counsel during closing arguments. As such, an Indiana Evidence Rule 404(b) analysis is necessary. Ind. Evid. R. 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during

> trial if the court excuses pre-trial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

At the outset of the instant proceedings, Lewis' counsel said, "we feel that any prior conviction, prior criminal investigations, prior discussions about his involvement with the police, or anything like that, should be excluded." (Tr. p. 8). The trial court agreed. The State agreed with the following limitations, "[t]he door can be opened to all of the reasons [Detective Marvin] Cummings [(Detective Cummings)] put him in the photo array and then wrapped up and, and terminated his investigation by a line of inquiry or even during closing argument, an argument that suggests [Detective] Cummings dropped the ball by not . . . searching the entire city to find the 911 caller for instance, or not working hard enough to develop another suspect." (Tr. pp. 8-9). (The trial court could not have considered itself bound by the State's limitation. After the trial court issues a ruling the State cannot unilaterally make it conditional.) No other discussion was held regarding Lewis' prior convictions, prior criminal investigations, or his involvement with the police until closing arguments.

During closing arguments, Lewis' counsel stated:

> This is not an indictment of the police investigation in this case, or the fact that these officers weren't hustling and [bustling] to get this person and to get this done. But there are some decisions that were made and some things that weren't done, that if they were, you would have information that you could use to make this decision. . . . You heard on the 911 tape, I see two guys [wailing] the piss out of each other in the alley.

(Tr. pp. 435-36). The State then moves to reopen its case because:

> There's a very good reason why [Detective Cummings] didn't attempt to ascertain any further whether he had the right guy and whether he'd come up with the appropriate suspect. . . . He's got to decide at some point when

> the case is solved and whether he's got to do more to make sure he's got the right guy. He made that determination in this case . . . . Part of what, why he made that determination is because [Lewis] is caught ten days later kicking in the front door of another residence just a couple blocks away from where, dressed the same way, wearing jersey gloves, and getting caught by the residents again. And he's been convicted three times before for, for burglary.

(Tr. pp. 437-39).

The State's argument is clearly based on the exact reasons evidence of other crimes, wrongs, or acts is not admissible. *See* Ind. Evid. R. 404(b). Detective Cummings, in response to how [Lewis] was developed as a suspect, testified:

> I received a report on March 14th, roughly twelve days after I received the case we're on now, which was on the 2nd, where [Lewis] was identified as a suspect. He was detained on the scene wearing brown jersey gloves. The witnesses and the victims on that case had detained him.

(Tr. p. 450). That is "what brought [Lewis] to [Detective Cummings'] attention as a suspect in this case." (Tr. p. 451). However, to be admissible under Ind. Evid. R. 404(b), the evidence must be relevant to some matter other than the defendant's propensity to commit crimes and the prejudicial effect of the evidence must not substantially outweigh its probative value pursuant to Ind. Evid. R. 403. *Berry v. State*, 715 N.E.2d 864, 867 (Ind. 1999). Detective Cummings' testimony, upon the State reopening its case, does not seem to be relevant for any other reason than Lewis' propensity to commit crimes.

The trial court's limiting instruction even directs the jury's attention toward Lewis' propensity to commit crimes. The trial court twice admonished the jury, once stating, "this new testimony from [Detective] Cummings is offered for one issue only, and that is to establish why the police developed [Lewis] as a suspect," and later stating,

"the fact that an individual is identified as wearing gloves on one day and wearing gloves on another day cannot be considered by you to determine the guilt or innocence as to the crimes charged. It is only admitted for the limited purpose of showing how [Detective Cummings] developed [Lewis] as a suspect in this case." (Tr. pp. 452-53). One of the exceptions to allowing evidence of other crimes, wrongs, or acts is to prove identity. While this seems the most plausible exception under Ind. Evid. R. 404(b), the State does not argue that point and the trial court instructed the jury not to consider Detective Cummings' additional testimony for the purpose of identifying Lewis. The State does argue that "while Ind. Evid. R. 404(b) generally prohibits the State from presenting evidence of similar crimes as evidence of a defendant's guilt, police officers are under no similar restriction when investigating a case and developing a suspect." (Appellee's Br. p. 9). While that may be true for police investigations, it does not create a special exception for police testifying for the State at trial. Therefore, we find Detective Cummings testimony was not relevant for any reason other than to establish Lewis' propensity to commit crimes, for that is the basis behind Detective Cummings' focusing upon Lewis as a suspect in the instant case. *See* Ind. Evid. R. 404(b). Additionally, even if there were some acceptable reason for allowing Detective Cummings' testimony, the probative value of his testimony would still be "substantially outweighed by the danger of unfair prejudice" and thus inadmissible. Ind. Evid. R. 403. Presumably, unfair prejudice was one of the bases the evidence was excluded in the first place.

CONCLUSION

Based on the foregoing, we find the trial court abused its discretion by allowing the State to re-open its case during closing arguments.

Reversed and remanded for a new trial.

NAJAM, J., and BARNES, J., concur.